82-1436

No. A-559

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1982

CITY OF TORRANCE,

Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA; STATE
COMPENSATION INSURANCE FUND,

Appellees.

ON APPEAL FROM THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Did the 1977 amendment to Labor Code §5500.5 impair the City of Torrance's insurance contract with State Fund?

2. Whether there is a substantial federal question presented to this court; i.e., whether there is any contractual impairment which exceeds constitutional bounds?

PARTIES TO THE PROCEEDING

Appellant is the City of Torrance, California. Appellees are the Workers' Compensation Appeals Board of the State of California, a State agency with judicial power to hear and decide workers' compensation cases, and State Compensation Insurance Fund, a statutorily created insurance carrier authorized to transact workers' compensation insurance in the State of California.

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Appellee, Workers' Compensation Appeals Board of the State of California, pursuant to Supreme Court Rule 16.1(b), moves for dismissal of this appeal on the ground that it fails to present a

substantial federal question and further moves that the Court affirm the judgment below on the "ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument." (Supreme Court Rule 16.1(c).)

STATEMENT OF THE CASE

Kenneth Atkinson was employed as a fireman by the City of Torrance (City)* from July 20, 1956 to April 30, 1977. On March 12, 1978, Atkinson died of lung cancer. His 15-year-old daughter, Christine, filed an application for workers'

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* Other abbreviations will be used in this brief as follows:

"Labor Code," California Labor Code; "Juris. State. App.," Jurisdictional Statement Appendix; "Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19)," Proceedings of Assembly Committee on Finance, Insurance and Commerce Into Problems of Assuming Payments of Compensation for Cumulative Occupational Injuries, Interim Hearings (January 12 & 19, 1977).

compensation death benefits against the City of Torrance and State Compensation Insurance Fund ("State Fund").[1] Christine claimed that her father's death was proximately caused by a cumulative injury which developed during the course of his employment with the City. In the course of

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1 State Compensation Insurance Fund is a statutorily created "competitive insurance carrier" authorized to transmit workers' compensation insurance to the same extent as any other insurance carrier. (Cal. Ins. Code §§11775, 11778.) The State Fund is self-supporting and self-operating. It is a legal entity distinct from the State as such, and may sue or be sued in its own name, enter into all proper contracts and obligations, invest and reinvest its monies, and otherwise conduct its business and perform all acts necessary for its operation. See Cal. Ins. Code §11783: Burum v. State Compensation Ins. Fund, 30 Cal.2d 575, 188 P.2d 805 (1947). In Burum, the Court held a statutory requirement of filing a claim with the State Board of Control was inapplicable to the State Fund because a claim against the State Fund was not a claim against the State. The Court concluded it was "inescapable that the entire framework of the Fund -- its organizations, its powers, its duties and its obligations -- show it was designed to be self-operating, and with a special and unique character; ..." Id., at 586.

litigation, the City settled the Atkinson claim for $28,165.49. The City, relying on §5500.5 of the California Labor Code ("Labor Code"), sought contribution from State Fund for 72 percent of the settlement amount. The State Fund moved for its dismissal from the case because Labor Code §5500.5, as amended in 1977,[2] provided that occupational disease or cumulative injury claims filed or asserted after January 1, 1978, "shall be limited to those employers who employ the employee during period of four years immediately preceding either the date of injury, as determined pursuant to §5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first."

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2 See footnote 10, infra.

Although it was undisputed that if Labor Code §5500.5 as amended in 1977 applied, the City, as legally uninsured employer was solely liable for the settlement, the City opposed the motion arguing that the 1977 amendment violated the state and federal prohibitions against impairment of contract since it impaired obligations arising out of its insurance contract (policy) with the State Fund. A referee (workers' compensation judge) agreed with the City's contention and ordered State Fund's contributive share of the settlement to be 72 percent or $19,550.38. The Workers' Compensation Appeals Board reversed the referee[3]

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3 California Labor Code §111 vests judicial power in the Workers' Compensation Appeals Board consisting of seven members. Labor Code §5309 gives the Board the power to direct or order a "referee" to try the issues in proceedings before it and to make and file findings, orders, decisions or awards subject to the reconsideration process described in Labor Code §§5906 to 5911. "Referees" are given the working title

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indicating, aside from whether or not any impairment was justified by removal of burdens placed on the workers' compensation system, "it has not been established that there has been any impairment." Petitioner filed a writ of review with the Court of Appeal of the State of California, Second Appellate District, Division 4, and that court, in its opinion filed October 27, 1981 (Juris. State. App., at pp. 26 to 38), affirmed the Workers' Compensation Appeals Board concluding:

"workers' compensation judge" by the Board's Rules of Practice and Procedure (See Cal. Adm. Code, Title 8, §10302.) The California Constitution, Article III, §3.5, as adopted June 6, 1978, provides that an administrative agency has no power to declare a statute unconstitutional or refuse to enforce a statute on the basis of being unconstitutional. Thus, the Board's comment in its decision that: "As the amendments to Labor Code §5500.5 effective January 1, 1978 are constitutional, we need not discuss whether or not the Board has jurisdiction to find a statute unconstitutional ..." (Opinion & Order Granting Reconsideration and Decision After Reconsideration, Juris. State. App., p. 43.)

"Although the relationship between the employer and the compensation insurer is contractual in origin, the scope of the insurer's liability is established by law. In particular, the terms and conditions of compensation payable to the injured worker or his survivors are as determined by the Legislature and are subject to change by legislative action.

"In the operation of this compensation system, the time when the employee was exposed to hazard does not necessarily determine which employer or insurer will be liable for the payments required by statute. Nor does the law in effect at the time of the employee's exposure necessarily determine the amount payable. Development of the law relating to compensation for occupational disease and cumulative trauma has from time to time imposed upon insurers and self-insurers liabilities of a kind and magnitude not known when the obligation was undertaken. Those liabilities were incurred because the insurers and self-insurers were obligated to pay what the law required as compensation and medical care for the disabled employee. The possibility of changes in the applicable law has become a part of the risk assumed by the compensation carriers and the self-insurers.

"The feature of the current law to which the City objects is simply the repeal of a provision which would have enabled the City to seek contribution from an insurer whose period

> of coverage expired June 30, 1971. That provision was repealed because of problems which it has raised, particularly the difficulty of establishing proper rates and adequate reserves for the incurred-but-not-reported liabilities which has been accruing. This change is consistent with the constitutional mandate to create a complete and effective system of compensation.
>
> "The change in law which relieved State Fund of an obligation which would have existed under the prior law, does not in any sense impair the obligation of 'any contract.'" (Juris. State. App., pp. 36-37.)

The City then filed a Petition for Hearing with the Supreme Court of the State of California which granted a hearing and, after oral argument, affirmed the decision of the Workers' Compensation Appeals Board finding that:

> "Since the City originally agreed to incorporate subsequent changes in the law of workers' compensation in its insurance agreements with the State Fund, it cannot complain that those changes impaired the State Fund's obligation. The City had every reason to anticipate that its rights under those agreements would change over time. It had no other legitimate

> contractual expectation." (Citation omitted.) (Juris. State. App., p. 13.)

The City has filed an appeal with this Court contending that its insurance agreement with the State Fund has been unconstitutionally impaired by the 1977 amendment to Labor Code §5500.5 in violation of the contract clause of the United States Constitution. Petitioner also requests the court to apply a stricter standard of review.[4]

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4 The contract under review is a private contract. The Board of Directors of the State Fund, with the exception of an ex officio chairperson, are appointed from the policyholders or the employees of policyholders and exercise power and authority over the State Fund in the same manner as a private insurance carrier. The management of the State Fund, its President, Executive Vice-President, and Vice-Presidents manage the transaction of workers' compensation insurance like any other insurer. (See Hanna, Calif. Law of Employee Injuries & Workers' Compensation, Vol I, 2nd Ed., §§2.04[4], p. 2-18, §2.04[5], pp. 2-17 and 2-18.) There is no financial liability for the State because the liability of the State Fund is limited to the

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INSURANCE CONTRACT

The contract in this case is a standard workers' compensation insurance policy, the same as issued to any employer by any workers' compensation insurance carrier. Since counsel for the appellant in its Jurisdictional Statement has misled the Court by deleting certain portions from the pertinent provisions of the insurance contract between the City and State Fund, (See pp. 5 and 15, Juris. State.), it is necessary to set forth those important portions which have been deleted. Under the policy the State Fund agrees:

"State Compensation Insurance Fund

Fund's assets. Cal. Ins. Code §11771. The stricter standard of review is not applicable and this Court may properly defer to the California Legislature's judgment as to the necessity and reasonableness of the 1977 amendment to Labor Code §5500.5. United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23; 97 S.Ct. 1505, 1518 (1977); Energy Reserves Group, Inc. v. Kansas Power and Light Co., 51 U.S.L.W. 4105 (1983), para. 11A.

> ... does hereby agree ... (1) To pay promptly and directly to any person entitled thereto under the Workmen's Compensation Laws of the State of California, and as therein provided, any sums due for compensation for injuries, and for the reasonable cost of medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, apparatus and artificial members ... and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the insured under the provisions of the Workmen's Compensation Laws of the State of California ...." (Emphasis added.) (Juris. State. App., p. 33, footnote 4.)

HISTORY OF LABOR CODE SECTION 5500.5 AND RELEVANT COURT DECISIONS

Article XIV, §4, of the California Constitution provides, in relevant part:

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their

employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for the vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government ...." (Emphasis added.)

Pursuant to this constitutional provision, and its predecessors dating back to 1911, and consistent with changing theories of compensability, economic circumstances and even moral concepts, the Legislature of the State of California has amended, added and deleted sections of workers' compensation laws since 1917 when the Workers' Compensation Insurance Safety Act was passed. These amendments and additions to the workers' compensation laws have covered each and every provision mandated by Article XIV, §4, of the California Constitution including establishing rules of compensability, definitions of injury, dates of injury, dependency, contribution and limitations of liability. As far back as 1913, constitutional challenges to the system have been answered by reference to the constitutional mandate and police power. Western Indemnity Co. v. Pillsbury, et al.,

170 Cal. 686, 151 P. 398 (1915). In subsequent years, both the federal and state constitutionality of various provisions of the California Workers' Compensation Act has been frequently tested and its fundamental purposes have been upheld.[5] Consequently, this vast inter-related area of legislation affecting all the provisions mandated by the California Constitution, now represents a social system affecting the health, safety and well-being of the

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5 For a general discussion see Hanna, Calif. Law of Employee Injuries and Workmen's Compensation, Vol. 2, 2nd Ed., §2.02(2)(a-h), pp. 2-8 to 2-17.

More recent California Supreme Court decisions upholding the constitutionality of California workers' compensation laws include rejecting an equal protection challenge to Labor Code §4458(b) which treated fire fighters differently from other volunteer fire fighters by fixing a minimum rate of compensation, Meredith v. WCAB, 19 Cal.3d 777, 567 P.2d 746 (1977), and an equal protection challenge to a 1959 amendment to a statutory presumption for compensability of heart trouble which provided such heart trouble could not be attributed to pre-existing disease. City & County of San Francisco v. WCAB (Wiebe), 22 Cal.3d 103, 583 P.2d 151 (1978).

work force of the state. Further, the Legislature has continued to pass laws, both substantive and procedural, to carry out the provisions of the constitutional mandate.[6]

In 1951, the Legislature codified the decisional rule in Colonial Insurance Co. v. IAC, 29 Cal.2d 79, 172 P.2d 884 (1946)[7] by enacting Labor Code §5500.5 which purpose was to facilitate recovery for injuries due to progressive occupational diseases by providing that an injured employee might elect to proceed against one or more of his successive employers or insurance carriers for the entire consequence

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6 For summary of legislative action on workers' compensation law in 1982, see: Hanna, Workers' Compensation Laws of California, Effective January 1, 1983, Matthew Bender & Co., pp. vii to xiv.

7 In Colonial Ins. Co., there was one employer, Emsco Refractories Co., and nine insurance carriers with one period of uninsurance.

of his occupational disease even though that particular employment was not the sole cause of disability. This legislation also provided for contribution proceedings and a special presumption for silicotic exposure from employment in underground work.

Federal and state constitutional attacks against §5500.5 were rejected in Subsequent Injuries Fund v. IAC (Walters), 48 Cal.3d 365, 310 P. 7 (1951); Subsequent Injuries Fund v. IAC, 49 Cal.2d 354, 317 P.2d 8 (1957). The Court, in Pacific Employers Ins. Co. v. IAC (Snell), 219 Cal.App.2d 634, 33 Cal.Rptr. 442 (1963), rejected a claim that a 1959 amendment to Labor Code §5500.5[8] was an unconstitutional

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8 Labor Code §5500.5 as enacted in 1951 provided that if an employer or insurer were insolvent, payment of any amount attributed to that portion of liability would be from the Subsequent Injuries Fund. The 1959 amendment deleted this

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violation of due process, stating:

> "The Legislature, apparently accepting this argument, withdrew the use of the Fund for reimbursement. Whether or not this was an act of sound legislative policy is not for us to say. Our inquiry can go no further than to determine whether section 5500.5, after removal of the public reimbursement feature, was within or exceeded the limits of the police power. [6] We make this determination guided by the restraining principle that a 'legislative act is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.' (Citation omitted.) [1c] We face recognition that workmen's welfare was high priority in public interest, that

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provision leaving the remaining solvent employers or insurers liable. The Attorney General reported to the Legislature in 1959 that the 1951 version of Labor Code §5500.5 imposed a financial burden on the taxpayers which properly should be borne by the insurance industry. (Report to Legislature Pursuant to Labor Code §4753 by Stanley Mosk, Attorney General, January 1959, p. 24.) The report concluded that "Section 5500.5 has been and will be used almost exclusively by insurance companies to reimburse them for a liability which resulted from an insurance contract executed prior to the enactment of Section 5500.5" (Id., at pp. 30 & 31.) The Attorney General's statement clearly implies that contracts of workers' compensation insurance incorporate subsequent legislative enactments.

> occupational diseases and particularly silicosis with its insidious progression to disability, are matters of grave concern in this field.
>
> "The problem with which the Legislature was concerned here has no perfect solution. It is a situation where the entity properly chargeable cannot be reached. Either the injured employee must go uncompensated or someone else must 'pick up the tab' -- either the public, the industry as a whole, or those solvent members of it who participated in causing the disability. The Legislature has selected the last alternative. We believe it acted reasonably ....
>
> "Tested by the foregoing principles we cannot say that the plan of the section as amended in 1959, whereby any selected employer or employers contributing to the disability of the silicosis victim must bear the burden of the entire award with only the limited right of reimbursement retained and without recourse to public funds to effect complete reimbursement, is not a valid exercise of the police power -- and we so hold. (219 Cal.App.2d 634, 643-644.)

Although §5500.5 originally referred only to occupational disease, the court interpreted that language as including cumulative traumas. (See Freuhauf Corp. v.

Workmen's Compensation Appeals Board, 68 Cal.2d 569, 576; 68 Cal.Rptr. 164, 168 (1968). The proliferation of occupational disease and cumulative trauma cases consistent with new medical theories created a procedural nightmare for the Workers' Compensation Appeals Board. Because of the multiple carriers and employers involved in litigation of a cumulative trauma or occupational disease claim, inordinate delays and excessive cost were obstructing the constitutional mandate to accomplish substantial justice expeditiously, inexpensively and without encumbrance of any character. These cases became a major calendaring problem throughout the state affecting the claims of other employees because their cases could not be handled expeditiously. Tremendous resources of the Board had to be expended in processing

multiple party claims.[9]

Reacting to this situation, the Legislature, in 1973, amended Labor Code §5500.5 to ameliorate these problems by limiting liability for occupational disease or cumulative injury to those who had employed the worker during the five years immediately preceding the injury or last date of hazardous employment, subject to an exception commonly

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9 See Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19), pp. 55-56, 353. See Harrison, et al. v. Peninsula Steel Co., et al., 39 Calif. Compensation Cases 326 (1974), the Appeals Board's en banc decision affirmed by the California Court of Appeal in Harrison, infra, for a detailed discussion of burdens and problems for the WCAB resulting from pre-1973 legislation.

known as the "single employer rule."[10]

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10 Labor Code §5500.5, as amended in 1973, provided:

"§5500.5(a) Liability for occupational disease or cumulative injury shall be limited to those employers who employed the employee during a period of five years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior years except as provided in subdivision (d); however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

"(b) Where a claim for compensation benefits is made on account of an occupational disease or cumulative injury which may have arisen out of more than one employment, the application shall state the names and addresses of all employers liable under subdivision (a), the places of employment, and the approximate periods of employment where the employee was exposed to the hazards of the occupational disease or cumulative injury. If the application is not so prepared or omits necessary and proper employers, any interested party, at or prior to the first hearing, may request the appeals board to join as defendant any necessary or proper party. If such request is made prior

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to the first hearing on the application, the appeals board shall forthwith join the employer as a party defendant and cause a copy of the application together with a notice of the time and place of hearing to be served upon such omitted employer; provided, such notice can be given within the time specified in this division. If such notice cannot be timely given or if the motion for joinder is made at the time of the first hearing, then the appeals board or referee before whom the hearing is held, if it is found that the omitted employer named is a necessary or proper party, may order a joinder of such party and continue the hearing so that proper notice may be given to the party or parties so joined. Only one continuance shall be allowed for the purpose of joining additional parties. Subsequent to the first hearing the appeals board shall join as a party defendant any additional employer when it appears that such employer is a proper party, but the liability of such employer shall not be determined until supplemental proceedings are instituted.

"(c) In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the five-year period set forth in subdivision (a), the employee making the claim, or his dependents, may elect to proceed against any one or more of such employers. Where such an election is made, the employee must successfully prove his claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his dependents has made an election to proceed against one or more employers, it should appear that there is another

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proper party not yet joined, such additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of such employer shall not be determined until supplemental proceedings are instituted. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board's final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his dependents such information as will as enable the employer to determine the time, place, and duration of the alleged employment. On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurors [sic] who insure the workmen's compensation liability of such employer, during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.

"The provisions of this subdivision shall expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date.

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"(e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under such award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. Such a proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his dependents, but shall be limited to a determination of the respective contribution rights, interests or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss such employer and amend its original award in such manner as may be required.

"(f) In any proceeding before the appeals board for the purpose of determining an apportionment of liability or of a right of contribution where any employee incurred a disability or death resulting from silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows:

"(1) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee's employment in such operations shall be jointly and severally liable for the payment of compensation and of medical, surgical, legal and hospital expense which may be awarded to the employee or his estate or dependents as the result of disability or death resulting from or aggravated by such exposure.

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"(2) In making its determination in the supplemental proceeding for the purpose of determining an apportionment of liability or of a right of contribution of percentage liabilities of the various employers engaged in underground metal mining operations the appeals board shall consider as a rebuttable presumption that employment in underground work in any mine for a continuous period of more than three calendar months will result in a silicotic exposure for the employee so employed during the period of employment if the underground metal mine was driven or sunk in rock having a composition which will result in dissemination of silica or silicotic dust particles when drilled, blasted or transported.

"(g) Any employer shall be entitled to rebut such presumption by showing to the satisfaction of the appeals board, or its referee, that the mining methods used by the employer in the employee's place of employment did not result during his employment in the creation of silica dust in sufficient amount or concentration to constitute a silicotic hazard. Dust counts, competently made, at such intervals and in such locations as meet the requirements of the Division of Industrial Safety for safe working conditions may be received as evidence of the amount and concentration of silica dust in the workings where such counts have been made at the time when they were made. The appeals board may from time to time, as its experience may indicate proper, promulgate orders as to the frequency with which such dust counts shall be taken in different types of workings in order to justify their acceptance as evidence of the existence or nonexistence of a silicotic hazard in the property where they have been taken.

"(h) The amendments to this section adopted at the 1959 Regular Session of the Legislature shall operate retroactively, and shall apply retrospectively to any cases pending before the

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That exception was in subdivision (d) of §5500.5 as enacted in 1973 and provided in essence that where the employment of the injured worker was more than five years with the same employer, or its predecessors in interest, the five-year limitation of liability would be inapplicable in that liability in such circumstances would extend to all insurers who insured the workers' compensation liability of such employer during the entire period of the employee's exposure with that employer, or its predecessors in interest. The Legislature expressly

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appeals board or courts. From and after the date this section becomes effective no payment shall be made out of the fund used for payment of the additional compensation provided for in Section 4751 of this code, or out of any other state funds, in satisfaction of any liability heretofore incurred or hereafter incurred, except awards which have become final without regard to the continuing jurisdiction of the appeals board on said effective date, and the state and its funds shall be without liability therefor. This paragraph shall not in any way effect a reduction in any benefit conferred or which may be conferred upon any injured employee or his dependents."

provided that this exception would expire on July 1, 1986 unless otherwise extended by the Legislature prior to that date.

In Harrison v. Workers' Compensation Appeals Board, 44 Cal.App.3d 197; 118 Cal. Rptr. 508 (1974), the Court upheld the application of the 1973 amendment to injuries occurring before its effective date. The Court noted that the 1973 amendment brought California more in line with most workers' compensation systems in other jurisdictions[11] and concluded that in light of the

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11 See 4 Larson, Law of Workmen's Compensation §95.21 to 95.25, pp. 17-79 to 17-95; Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19), pp. 397-402. For decisional application of the last employer doctrine, see Cordero, et al. v. Triple A Machine Shop, et al., 580 F.2d 1331, 9th Circ. (1978), cert. denied, 440 U.S. 911, 99 S.Ct. 1223 (1979). Travelers Ins. Co., et al. v. Cardillo, 225 F.2d 137, 145 (CA2 1955), cert. denied, 350 U.S. 913, 76 S.Ct. 196.

legislative history of the section and the serious procedural problems presented by the Appeals Board,[12] it did not find it difficult to ascertain and identify the

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12 The Court noted in Harrison that, under the pre-1973 Labor Code §5500.5, proceedings were encumbered by numbers of attorneys representing numerous carriers and employers, each of whom had a right to appear and cross-examine the applicant and other witnesses. The "single employer exception" after 1973 until the 1977 amendment to Labor Code §5500.5 still contributed to this problem. Many single private employers have numerous insurance companies over the years with varying periods of coverage necessitating appearances by multiple attorneys in Board proceedings either at the initial hearing or at contribution hearings. Even in a case like the present one, both the City and the carrier may seek their own medical-legal evidence, present their own witnesses, cross-examine the injured worker, not only to defeat or limit the other worker's claim, but to shift the liability for benefits between each other. (See Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19), pp. 188-189.) Tidewater Oil Co. v. WCAB, 67 Cal.App.3d 950, 137 Cal. Rptr. 36 (1977) is another example of litigation under the single employer exception which deprives injured workers of expeditious hearings while the alleged employers litigate "prececessor in interest."

intent of the Legislature, charged as it was with a constitutional duty to provide a workers' compensation system which "shall accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character ...." (Citation omitted.) In 1977, §5500.5 was amended to reduce the five-year period to a one-year period by 1981, as well as to eliminate the time limited single employer exception.[13] In 1979, the California

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13 Labor Code §5500.5(a) as amended in 1977 provided in pertinent part:

"[L]iability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury ... or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease

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Supreme Court, in Flesher v. WCAB, et al., 23 Cal.3d 322, 152 Cal.Rptr. 459 (1979), set forth the history of §5500.5 and indicated with reference to the 1973 and 1977 amendments:

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or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year"

* * *

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

See footnote 10 for repealed §5500.5(d).

> "The purpose of these amendments was to provide greater certainty to insurers in anticipating cost and necessary reserves, to simplify the proceedings by reducing the number of employers and insurers required to be joined as defendants, and to reduce the burden placed on the entire system by the former procedures ...."
> 23 Cal.3d at 328; 152 Cal.Rptr. at 463.

The 1977 amendment was directed at the workers' compensation system as a whole; employers, insurance carriers, self-insured employers were all affected by this legislation. The creation of greater certainty in predicting future liability inures to the benefit of insured and uninsured employers alike.[14] The imposition of

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14 This legislation was widely supported in spite of the effect on all segments of the workers' compensation community, although some public entities did oppose it. The insurance industry did stand to benefit from greater certainty in predicting risks. However, this Court has held: "Legislation [cannot] be set aside by the courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it." Cohen v. Beneficial Industrial Law Corp., 337 U.S. 541, 550, 551; 69 S.Ct. 1221, 1228 (1949). Over a

liability upon current employers and carriers motivate those best able to correct hazardous or unsafe conditions to do so, thus providing safe places of employment pursuant to the constitutional mandate and, at the same time, reducing the cost

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period of years the costs for self-insured employers will even out because self-insured employers will not be liable for employers who have left and gone to work for other employers for the limited periods of employment provided in Labor Code §5500.5 as amended in 1977. In addition, self-insured employers are faced with the same problems as insurance carriers in ability to measure and provide for future cumulative injury liability. See Proceedings of Cal. Assem. Comm. on Finance, Insurance & Commerce, Appendix, p. 367.

In Cordero v. Triple A Machine Shop, supra, at 1336, the Court noted the underlying rationale of the last employer doctrine is that all employers will be last employers a proportionate share of the time. In accord, Flesher, supra, at p. 328, "The insurance industry favored these amendments and reasoned that total burdens and benefits upon employers and insurers would more or less even out for, while they might be required to assume a larger liability in some cases, they would be absolved of liability in other cases." (Citation omitted.)

of workers' compensation benefits. The elimination of procedural morass and delay at Board proceedings also served to eliminate unnecessary litigation costs complying with the constitutional mandate to accomplish substantial justice both expeditiously and inexpensively.

THE CITY OF TORRANCE'S CONTRACT OF INSURANCE WITH STATE COMPENSATION INSURANCE FUND WAS NOT IMPAIRED BY THE 1977 AMENDMENT TO LABOR CODE SECTION 5500.5

The Supreme Court of the State of California considered the City's contention "that it paid the State Fund valuable consideration in the form of insurance premiums." In return, the State Fund allegedly promised to pay benefits for that portion of any cumulative injury attributable to the period during which coverage was provided to the City (Juris. State. App., p. 11) and the further contention that "the repeal of the 'single employer exception'

operated to release to a substantial degree the State Fund from this obligation." (Ibid.) The Court analyzed the pertinent provisions of the insurance contract indicating that "It is apparent that the City's characterization of the State Fund's obligation is not accurate." The Court pointed to those references in the contract to workers' compensation laws which appellant has deleted from its Jurisdictional Statement and concluded that the only obligation the State Fund assumed was the obligation to pay what the workers' compensation law required. The Court noted the language of the contract and the concession of the City at oral argument that it was the parties' intention to incorporate subsequent changes in law into their insurance agreements. (See Appendix, infra, p. 1, for a more accurate and detailed transcription of that portion of

oral argument referred to by the California Supreme Court in its opinion.) In view of the City's concession that the insurance contract contemplates "all kinds of amendments" to workers' compensation laws, its contention that the 1977 amendment to Labor Code §5500.5 impairs its obligation of contract is illogical, if not frivolous.

In cases involving the validity of a state statute where it is alleged that the statute impaired the obligation of a contract, the U. S. Supreme Court may independently evaluate the nature and extent of the obligation of contract. (Irving Trust Co. v. Day, 314 U.S. 556, 62 S.Ct. 398 (1942).) The Court will, however, attach a great weight to the views of the highest court of the state as to the existence and nature of the alleged contract. Higginbotham v. Baton Rouge, 306 U.S. 535,

59 S.Ct. 705, rehearing denied, 307 U.S. 649, 59 S.Ct. 831 (1939); Dodge v. Board of Education, 302 U.S. 74, 58 S.Ct. 98 (1937).[15]

In United States Mortgage Co. v. Matthews, 293 U.S. 232, 55 S.Ct. 168 (1934), this Court considered a 1925 mortgage instrument that provided that the mortgagor consented to sale of the mortgaged property in accordance with an 1898 statute or any amendment thereto. This Court overruled a state court holding that the mortgage contract meant to include only statutory amendments up to 1925, the date of making, and that the application of a 1933 statute would be an impairment of contract rights.

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15 A lower court's decision is to be given most respectful consideration and followed unless it seems to be plainly erroneous. Millsap College v. City of Jackson; 275 U.S. 129, 132, 48 S.Ct. 94, 95 (1927).

This Court found that the challenged act could not properly be said to impair the obligation of contract between the parties within the meaning of the federal constitution stating that a contrary holding would deprive "the words of the contract of their customary meaning."

In an early case on adopting an approach of affirming on a motion to dismiss, this Court indicated that the state court ruling "was so obviously correct that we did not feel constrained to retain the case for further argument." Richardson v. Louisville N.R.R., 169 U.S. 128, 132, 18 S.Ct. 268 (1898). Subsequent decisions of this Court have indicated that dismissal is appropriate if the questions presented are frivolous, while affirmance is appropriate if the questions are so far wanting in

substance as not to require argument beyond the appeal papers and opposing motions.[16] Appellee would contend that this Court, on the record before it, may either dismiss the appeal on the ground of the frivolity of the City's assertions in light of its contractual agreement or upon the ground "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument." (Supreme Court Rule 16.1(c).) Further, since the finding by the State Supreme Court that there is no impairment of contract is so obviously correct, there is left no substantial federal question for the Court

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16 Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459, 59 S.Ct. 622 (1939); Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435 (1923). For general discussion, see Wright & Miller, Federal Practice & Procedure, §4014, pp. 631-639.

to consider.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION BEFORE THE COURT

The Court of Appeal of the State of California analyzed the effect of change of law on the policy of insurance between the State Fund and the City as follows:

> "In carrying out its constitutional mandate to provide a system of workers' compensation insurance which makes 'adequate provisions for the comfort, health and safety and general welfare' of workers and their dependents [sic], the Legislature needs to modify the system from time to time. The evolution of social and economic conditions and the teaching of experience impel continual reexamination of the compensation system.
>
> "As changes in substantive and procedural law occur, whether by legislative enactment or judicial interpretation, some impact upon the insurer's risk is inevitable. A few examples will illustrate this truism.
>
> "The Legislature has from time to time changed the rate of compensation for disability; and it has long been recognized that the measure of compensation is governed by the law in force at the time the employee sustains an industrially caused

disability. Thus in Argonaut Mining Co. v. Ind. Acc. Com., 104 Cal.App.2d 27 (1951), a disability occurring in 1948 as a result of exposure to silica hazards between 1923 and 1928 was held compensable under the statutes in effect in 1948. The employer contended that this result violated the contract impairment clauses of the California and federal Constitutions, arguing that the statutes in existence at the time of employment were a part of the contract of employment. The Court of Appeal rejected that argument, pointing out that the employer's duty to pay compensation was not contractual but statutory; and that the applicable rate was that which the law provided at the time the right to compensation came into existence. The court said at page 31: 'Regardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability. It would seem that the law then in effect should govern the claimant's rights.'

"In State of California v. Industrial Accident Commission, 175 Cal.App.2d 674 (1959), the employer and its compensation carrier were awarded partial indemnification from the California Subsequent Injuries Fund under a provision of Labor Code Section 5500.5 which was then in force. While the state's proceeding to review that award was pending in the Court of Appeal, legislation deleting that

provision of section 5500.5 went into effect, together with a legislative declaration that the deletion should apply retrospectively to any cases pending before the Commission or the courts. Accordingly, the Court of Appeal ordered the Commission to annul the indemnification award.

"The development of the law with respect to progressive occupational disease and cumulative trauma itself illustrates the impact of changes in the law upon the risks to which compensation insurers and self-insurers have been exposed." (Juris. State. App., pp. 33-35.)

After discussing various decisions of the California appellate courts, the Court of Appeal concluded:

"Although the relationship between the employer and the compensation insurer is contractual in origin, the scope of the insurer's liability is established by law. In particular, the terms and conditions of compensation payable to the injured worker or his survivors are as determined by the Legislature and are subject to change by legislative action.

"In the operation of this compensation system, the time when the employee was exposed to hazard does not necessarily determine which employer or insurer will be liable for the payments required by statute. Nor does the law

> in effect at the time of the employee's exposure necessarily determine the amount payable. Development of the law relating to compensation for occupational disease and cumulative trauma has from time to time imposed upon insurers and self-insurers liabilities of a kind and magnitude not known when the obligation was undertaken. Those liabilities were incurred because the insurers and self-insurers were obligated to pay what the law required as compensation and medical care for the disabled employee. The possibility of changes in the applicable law has become a part of the risk assumed by the compensation carriers and the self-insurers." (Emphasis added) (Juris. State. App., pp. 36-37.)

Pursuant to constitutional mandates of "full provision for adequate insurance coverage against liability to pay or furnish compensation" and full provision for regulating such insurance coverage and for otherwise securing the payment of compensation all, as part of a complete system of workers' compensation (See Art. XIV, §4, supra, p. 11), the California Legislature has heavily regulated for all employers the option of self-insuring and the

provision of insurance coverage under the workers' compensation laws of the State of California.[17] Although the general laws of insurance contracts apply to California workers' compensation insurance policies, the content of such policies is governed in important particulars by statute[18] and must be approved as to substance and form by the Insurance Commissioner after consultation with the Workers' Compensation Appeals Board.[19]

Although the insurance contract between the insurer and the employer is private, the public nature of workers' compensation law in the State of California

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17 See Labor Code §§3700-3760; Insurance Code §§11650 thru 11660.

18 Ibid. See in particular §11654 which requires insurers to be bound by orders, findings, decisions or awards rendered against an employer "under the provisions of the law imposing liability for compensation...."

19 Calif. Ins. Code §11659.

is extremely pertinent to the constitutional question raised by appellant. This Court has consistently upheld the exercise of the police power as the principle constitutional basis for the enactment of workers' compensation legislation. The majority of cases hold that workers' compensation laws come under the police power of the states because they lessen the probability that an injured worker will become a public charge, maintain the economic welfare of people and promote the State's interest in the security of those under the protection of its laws.[20] In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, rehearing denied, 439 U.S. 886, 99 S.Ct. 233 (1978), this Court held:

> "First of all, it is to be accepted as a commonplace that the Contract

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20 Madera Sugar Pine Co. v. IAC, 262 U.S. 499, 43 S.Ct. 604 (1923).

> Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statues impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." Manigault v. Springs, 199 US 473, 50 L.Ed. 274, 26 S.Ct. 27. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in Hudson Water Co. v. McCarter, 209 US 349, 357, 52 L.Ed. 828, 28 S.Ct. 529: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract." 438 U.S. at 242, 98 S.Ct., at 2721.

As the Supreme Court of the State of California has indicated, a finding that the State, in exercise of its police power, has abridged an existing contractual relationship does not in and of itself establish

a violation of the contract clause. The court below, however, found no such abridgement making it unnecessary to move to the second inquiry as to whether or not an impairment exceeded constitutional bounds.

Appellant has incorrectly applied the criteria set forth in Home Building & Loan Association v. Blaisdell, 209 U.S. 398, 54 S.Ct. 231 (1934), to this case. In Allied Structural Steel Co., supra, this Court held that a Minnesota law impaired the obligation of contract because the law did not deal with a broad generalized economic or social problem, did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, did not affect simply a temporary alteration of contractual relationships and had a narrow aim. (438 U.S. at 250;

98 S.Ct., at 2725.)

In Energy Reserves Group, Inc. v. The Kansas Power and Light Co., 51 U.S.L.W. 4105 (1983), Justice Blackman set forth the applicable law on the question of whether or not a state law in fact operated at the substantial impairment of a contractual relationship as follows:

> "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' Allied Structural Steel Co., 438 U.S., at 244. See United States Trust Co., 431 U.S., at 17. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Allied Structural Steel Co., 438 U.S., at 245. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. United States Trust Co., 431 U.S., at 26-27. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. Id., at 31, citing El Paso v. Simmons, 379 U.S. 497, 515 (1965). In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. Allied

Structural Steel Co., 438 U.S., at 242, n. 13, citing Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S. 32, 38 (1940) ('When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.'). The Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.' Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. United States Trust Co., 431 U.S., at 22, such as the remedying of a broad and general social or economic problem. Allied Structural Steel Co., 438 U.S., at 247, 249. Furthermore, since Blaisdell, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. United States Trust Co., 431 U.S., at 22, n. 19; Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S., at 39-40. One legitimate state interest is the elimination of unforeseen windfall profits. United States Trust Co., 431 U.S., at 31, n. 30. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

"Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' United States Trust Co., 431 U.S., at 22. Unless the State itself is a contracting party, see id., at 23, '[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id., at 22-23."[21]

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21 In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), this Court held that while the Due Process Clause placed greater limitations on the Government power to legislate retrospectively rather than prospectively, Congress had broad discretion to deal with the serious social problem of pneumoconiosis affecting former miners and the federal statute, requiring operators of coal mines to compensate employees who had contracted pneumoconiosis even though the employees had contracted pneumoconiosis before the act was passed, was a rational measure to spread the costs of the employee's disability to those who have profited from the fruits of their labor -- the operators and the consumers." 428 U.S., at 18, 96 S.Ct., at 2893.

In Todd Shipyards Corp., et al. v. Edith Witthuhn, et al., 596 F.2d 899 (1979), the Court held an amended provision of the

(continued on next page)

Longshoremen and Harbor Workers' Compensation Act to be applicable to claims based upon death occurring after the amendment's effective date even though the disabling injury occurred before that date. The Court not only rejected the constitutional challenge to retrospective application of the amendment, but considered the contention that the statute violated Art. I, §10 of the U. S. Constitution stating: "Moreover, even if the Contract Clause were incorporated into the Fifth Amendment due process by analogy to Bolling v. Sharp, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), that would not help petitioners. Their expectations that the government would not require Todd to pay death benefits did not give rise to vested rights which could not be modified retroactively." The Court cited Allied, supra, p. 38, for the proposition that the parties cannot remove the power of the state to regulate rights by making a contract about them and indicated immunity from Federal Regulation could not be gained by "forehanded contracts." Id., at 904. In this case, the Appeals Board stated: "Even if defendant City had a right to contribution from petitioner by reason of the previous subsection (d), such right was not of common law origin and was not vested but inchoate. When subsection (d) was not included in the amendment effective January 1, 1978, defendant lost its right to contribution, thereon based, for any matter where the claim was filed after such effective date. (cf. Subsequent Injuries Fund v. IAC (Koski).) (Juris. State. App., p. 43.) [Official citation: 175 Cal.App.2d 674, 346 P.2d 861 (1959)].

There is no doubt in the present case that the insurance contract itself refers to subject matter of workers' compensation which has been heavily regulated and subjected to legislative change ever since the inception of the Workers' Compensation Act in the early 1900's. The contract, in fact, incorporates those laws that have been amended and continue to be amended. The appellant would have the court believe that Labor Code §5500.5, as amended in 1977, did not address a broad social problem but merely focused on so-called "single employers." This ignores the fact that the elimination of the single employer exception was only a small part of the 1977 amendments to Labor Code §5500.5. As indicated above, the purpose of both the 1973 and 1977 amendments was to carry out the constitutional mandates by providing greater certainty to insurers and employers

in anticipating cost and necessary reserves, simplifying procedure and reducing the burdens placed on the entire system by former procedures.

In 1973, the Legislature enacted the single employer exception as a temporary measure. Since single employers under the 1973 amendment as well as insurers would share in the benefits of the 1977 amendments to Labor Code §5500.5, there was neither a substantial nor a severe permanent change in any previous contractual relationship. In any event, changes in workers' compensation laws were part of the risk all employers assumed whether under specific provision of these insurance contracts or in their self-insured status.

Appellant has simply failed in its burden to show this Court any substantial impairment of its insurance contract with State Fund. Cumulative trauma and

occupational disease claims are but a portion of claims for which coverage is provided individual employers. More important is the totality of these kinds of claims throughout the work community and the significant burden on the litigation system. The shift of $52,700,000 of liability in a workers' compensation system where over $800,000,000[22] worth of benefits were paid by insurance companies each year was relatively insignificant when the Legislature was confronted with facts supporting the proposition that workers' compensation would almost inevitably become uninsurable in California unless a method of determining an

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22 Paid workers' compensation losses for the insurance industry in 1977 were $853,000,000. Direct losses incurred (paid losses plus reserves) were $1,237,000,000. Underwriters Report, 1977, Annual Statistical Review (May 25, 1978), p. 51.

employer's liability could be calculated on an actuarially sound basis.[23]

Petitioner has failed to demonstrate that the provision of greater certainty in anticipating costs and predicting liability in cumulative trauma and occupational disease cases, the reduction of litigation costs and expedited legal proceedings and the reduction of workers' compensation claims because of the elimination of hazardous or unsafe conditions, all significant and reasonable purposes of the 1973 and 1977 amendments to Labor Code §5500.5 designed to remedy an ailing workers' compensation system, in any way substantially impaired the petitioner's insurance contract with the State Fund.

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23 Calif. Assem. Comm. on Finance, Insurance and Commerce, Interim Hearings (Jan. 12 & 16), pp. 177-199.

CONCLUSION

For the foregoing reasons, appellee respectfully submits this appeal fails to raise a substantial federal question and should accordingly be dismissed.

Dated: April 12, 1983

WORKERS' COMPENSATION APPEALS BOARD

By Richard W. Younkin
RICHARD W. YOUNKIN
Secretary & Deputy Commissioner

APPENDIX

DECLARATION OF RICHARD W. YOUNKIN

I, RICHARD W. YOUNKIN, being deposed under penalty of perjury, do certify and say:

1. I am an attorney licensed to practice before all the courts of the State of California. I represented respondent, Workers' Compensation Appeals Board of the State of California, at the oral argument before the California Supreme Court in this case which is presently on appeal to this Court.

2. Petitioner's counsel, David E. Lister, in the Appendix to the Jurisdictional Statement included his Declaration stating: "All of the court's questions and my responses are set forth haec verba in connection with the issue whether the City had agreed to accept changes in the

terms of its agreement with State Fund." (Juris. State. App., p. 61.)

3. Fearing distortions and deletions similar to those petitioner's counsel made in presenting pertinent provision of the insurance contract (See Motion to Dismiss or Affirm, supra, pp. 10-11) and because the California Supreme Court in its Opinion referred to critical concessions made by petitioner's counsel, Mr. Lister, at the time of oral argument before that Court, I requested permission and arrangements were made with the Clerk of the Court to listen to the tape recording of the oral argument on March 24, 1983, At that time, I and my secretary, Annette L. Gabrielli, were permitted to listen to the tape and stop the tape and copy such portions of the oral argument as we deemed necessary. The following questions by the Court and answers by Mr. Lister were all of those

which related to the question of whether the insurance contract with State Fund incorporated subsequent changes in workers' compensation laws:

JUSTICE REYNOSO:

"But Counsel, the contract says -- and correct me if I am wrong -- says that the insurer does hereby agree to pay promptly and directly to any person entitled thereto under the workers' compensation laws of the State of California, period. That's as far as the contract goes.

"Is my understanding correct or incorrect?"

MR. LISTER:

"That's basically correct, Your Honor."

JUSTICE REYNOSO:

"Okay. Now, that's all the contract says. I take it there was no impairment of that contract or, put it differently, if you wanted to protect yourself in terms of the status quo, why was nothing more added other than to simply agree contractually that the carrier would pay pursuant to the laws of the State of California?"

MR. LISTER:

"Well, as you undoubtedly are aware, Justice Reynoso, the insurance contracts are contracts of adhesion. They are not something the terms of which is in general required by statute, and that is what is an insurance contract if you wish to be insured by the State Fund -- that is the sort of policy language that you accept. You don't have the power -- even the City of Torrance -- doesn't have the power to bargain over the terms and conditions of the language of the policy."

JUSTICE REYNOSO:

"So what was the obligation that was impaired?"

MR. LISTER:

"The obligation that was impaired was the obligation of the State Compensation Insurance Fund to pay the benefits which had been incurred during the injurious exposure suffered by Mr. Atkinson during the time that he was employed by the City of Torrance when the City was insured by the State Fund. It's clear that the State Fund would have had that obligation prior to the 1977 legislation and it's clear that the 1977 legislation eliminated that contractual obligation."

JUSTICE NEWMAN:

"But what does the phrase mean 'under the workmen's compensation laws of the State of California and as therein provided'? Are you saying that that doesn't contemplate amendment?"

MR. LISTER:

"Oh, no. It certainly does contemplate amendment. It contemplates all kinds of amendments, increases in rates, increases in the kinds of injuries that are found compensable, all sorts of things. What we are urging today is not that the Legislature is constrained and cannot increase rates. It clearly can and without impairing any kind of a contract. It will simply result in higher premiums paid by insured employers and in higher payments by currently self-insured employers. All we're saying is that the law of the State of California cannot tamper with and abrogate the rights of parties to private contracts --"

JUSTICE NEWMAN:

"Even though those rights are the rights as provided in the statute to be amended."

MR. LISTER:

"That's correct. But the duty of the insurance company to its insured to indemnify the insured for injuries which occurred during the insured's period of coverage exists despite amendments in other aspects of the ...."

JUSTICE NEWMAN:

"What words of the contract lead you to that conclusion?"

MR. LISTER:

"That's simply our view of what the contract clause of both the United States and Federal Constitutions require."

JUSTICE NEWMAN:

"And, incidentally, you said both the United States and the Federal."

MR. LISTER:

"I'm sorry. The United States and California."

JUSTICE NEWMAN:

"Are you sure the California Constitution applies?"

MR. LISTER:

"I believe it does, Your Honor."

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of April, 1983, at San Francisco, California.

RICHARD W. YOUNKIN